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No. 88-1259

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

BOOTH GARDNER, et al.,

Petitioners,

v.

LANFORD D. TRIBBLE,

Respondent.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. Introduction

In his brief in opposition, respondent Tribble makes essentially two arguments. The first is procedural; he argues that the petitioners did not "fairly or squarely" present to the District Court their contention that Mr. Tribble failed to show any illicit punitive intent on the part of any specific petitioner[1] (Brief in Opposition, p. 5). The second is more substantive; he argues that failure to show such intent is not fatal to his case. More specifically, Tribble argues that the petitioners' claim of qualified im-

[1] Significantly, respondent Tribble does not even allege that he adduced any evidence illustrating the punitive intent of any particular defendant.

munity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) can be defeated simply by showing that some sort of punitive intent might be inherent in the contested search policy itself, regardless of the lack of punitive intent on the part of any individual petitioner. Under this argument, punitive intent in the abstract will apparently suffice; there is no need to show who did the intending.

We take up each argument in turn.

II. The petitioners clearly pointed out to the District Court their contention that Tribble had failed to show any illicit punitive intent on the part of any specific petitioner.

In our reply brief before the district court, we stated as follows:

> Additionally, a 42 U.S.C. § 1983 complaint must set forth with precision a specific factual basis upon which plaintiff claims each defendant is liable. Fed.R. Civ.P. 8(a)(2); *Aldabe v. Aldabe*, 616 F.2d 1088, 1092 (9th Cir. 1980). Even a liberal interpretation of a civil rights complaint (only done in *pro se* pleadings) may not supply essential elements of a claim that are not initially pled. *Ivey v. Board of Regents*, 673 P.2d 266, 268 (9th Cir. 1982). A complaint will not be sufficient to state a claim if the allegations are mere conclusions unsupported by specific facts. *Id.*, *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). It is incumbent upon the plaintiff to allege with at least some degree of particularity overt acts which defendants engaged in which support plaintiff's claim. *Sherman*, 549 F.2d at 1290.
>
> Moreover, defendants' liability in civil rights cases must be personal; *respondeat superior* and vicarious liability theories are not applicable [citing cases] (Defendants' Reply Brief, pp. 2-3).

The District Court, to be sure, paid no attention to these contentions, and obviously failed to recognize their critical importance. But it was not because of lack of effort on petitioner's part, as these excerpts show. And for this reason, the Court of Appeals had jurisdiction of the issue

of the sufficiency of the evidence as to the intent of specific, individual petitioners. Indeed, the sufficiency of the evidence was crucial to the District Court's and the Court of Appeals' denial of qualified immunity.

In contrast to the District Court, the Court of Appeals addressed these contentions very explicitly. See Pet. Appendix A-12 and A-13. Whether it did so correctly is another matter, of course, and that is the major issue presented in our petition for certiorari. We turn next to that issue.

III. **The holding of the Court of Appeals on the issues of evidence of intent and causation present important questions regarding the scope of the qualified immunity defense in a § 1983 damage action.**

If this case involved solely a challenge to the validity of a prison policy, brought in the form of a declaratory judgment or injunctive action, petitioners would have little quarrel with the substantive arguments made by Mr. Tribble in his brief in opposition. Indeed, if that were all this case involved, the petition for certiorari would not have even been filed in the first place.

But this case involves much more; it involves an effort by Mr. Tribble to bring to trial all the state officials and employees in any way associated with that policy, and to extract money from them through a damage award under 42 U.S.C. § 1983. That element of the case—which is the sole element involved in our petition, raises important questions which should be decided by this Court. Those questions are:

1. **Must the plaintiff present some "direct evidence" of a defendant's improper purpose to defeat summary judgment based on qualified immunity?**
2. **Does the fact that a prison *policy* is at issue jettison the 42 U.S.C. § 1983 requirement that conduct by a specific named**

defendant caused the alleged constitutional deprivation?

Regarding the showing required to force the defendants to trial, consider, for example, Mr. Tribble's basis for distinguishing *Martin v. District of Columbia Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), vacated in part, 817 F.2d 144, reinstated sub nom. *Bartlett v. Bowen*, 824 F.2d 1240, *cert. den.* ___ U.S. ___, 108 S.Ct. 1121 (1988) (which established a "direct evidence standard).

> As noted by the Court of Appeals in the instant case (Pet. App. A-12), *Martin* is also factually distinguishable from the present case. The core of Martin's complaint was that the defendant officers were "animated by improper motives in deciding to pursue his arrest and indictment." *Martin*, 812 F.2d at 1429. Martin had to demonstrate subjective malice directed at him; at hand, the issue addresses a larger inquiry and a fact situation which is not comparable, an overall policy and practice which is absurd, exaggerated and has punitive impact. A more general and non-specific intent is involved; * * *—Brief in Opposition, p. 15.

The Court of Appeals took this same approach toward the intent issue. In distinguishing *Martin*, it stated:

> Here, in contrast, we are not concerned with the defendants' subjective malice in conducting the particular search upon Tribble; rather, Tribble asks us to examine the purpose of the policy requiring such searches. * * * In cases where the purpose of a prison regulation is at issue, there is no "direct evidence" equivalent to legislative history that plaintiffs may examine. To hold plaintiffs in such cases to a "direct evidence" standard would effectively insulate arbitrary governmental action from judicial scrutiny. (Pet. Appendix A-12.)

Regarding evidence of individual defendant culpability, the Court of Appeals went on to state:

> Defendants also assert that Tribble has failed to produce sufficient evidence linking any named defendant either to the particular search of him or to the creation of the digital rectal search policy. The difficulty, as defendants view it, is that Tribble has not ade-

> quately alleged that any of the named defendants harbored an unconstitutional motive. Tribble's suit, however, is not based upon the particular subjective intent of the defendants; rather it is based upon the purpose of the policy. (Pet. Appendix A-13)

In short, under the approach urged by Mr. Tribble and adopted by the Court of Appeals, the intent of any particular defendant is completely irrelevant. Under the analysis utilized below, it is the intent or "purpose" of *the policy* that is critical, and that is apparently to be determined in the abstract, i.e., without the need for any evidence regarding the conduct, intent, purpose, or motivation of any particular person.

This approach, petitioners would agree, might well make sense in a challenge to a policy mounted only through a declaratory judgment or injunctive action. But it makes no sense when applied in a damage action under § 1983, which imposes liability for damages upon "every person" who deprives a citizen of his constitutional rights. That causation requirement is the reason for our insistence upon both "direct" evidence and a link to each named defendant in the formulation and implementation of the challenged policy which is to be defended at trial.

Contrary to the suggestion of Mr. Tribble, our point is not that one type of evidence, *e.g.*, "direct," is, in the abstract, necessarily more reliable and probative than another, *e.g.*, "circumstantial." (See Brief in Opposition, pp. 9-19.)

Rather, the point is that, in order to force a § 1983 defendant *to trial*, the plaintiff must meet a burden of showing at least a modicum of evidence which establishes the link with the improper conduct of each named defendant from whom the plaintiff is trying to extract damages. *Martin* and *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988) cert. den. ___ U.S. ___, 109 S. Ct. 788 (1989) recognized that §1983 imposes such a burden in a damage action, while the Court of Appeals in this case held that no such burden exists. It is this burden which *Martin* and *Poe* were referring to when they required "direct" evidence which is

"more than inferential or circumstantial." *Poe*, 853 F.2d at 432. *See also Martin*, 812 F.2d at 1435.

Next, a word about the nature of that link in light of the holdings of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1988) that subjective intent is to play no role in applying the qualified immunity defense in damage actions against public officials. Under *Harlow* and *Anderson*, the question is whether *objectively viewed*, the individual named defendants could have reasonably believed their actions were proper under existing law. When the *Harlow* and *Anderson* requirements are combined with the § 1983 requirement of showing a causal link with each individual defendant, the burden is upon the plaintiff to show, through evidence specific to each named defendant, that such a reasonable belief could not have existed. Our point is simply that Mr. Tribble has here made no such effort, and he contends no such effort need even be made.

Note that under the approach of Mr. Tribble and the Court of Appeals, any defense of qualified immunity is inevitably swept aside. Once a factual dispute as to the purpose of a prison policy is raised—as is easily done with respect to any prison policy about which there may be a fair difference of opinion—all prison officials and employees in any way associated with that policy will be automatically immersed in that dispute, and the defense of qualified immunity will never be available to relieve them from the burdens of discovery and trial.

Prison officials should not be put in such an impossible position.

A final word regarding *Harlow*. Despite our reliance upon *Harlow*, we candidly recognize that its contours are not entirely clear. How should it be applied in a situation in which an improper subjective motive is itself a necessary element of the constitutional violation? Justice Scalia (sitting as Circuit Judge) phrased the problem this way in *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986):

The problem, however, is that whether (in the words

> of the *Harlow* test) "conduct does not violate clearly established * * * rights," 457 U.S. at 818, 102 S.Ct. at 2738, often, if not invariably, depends upon the intent with which the conduct is performed. And it is impossible to place "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law," *id.* (footnote omitted), when clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed. That is precisely the situation here. 807 F.2d at 184.

This is the same problem with which the same Circuit struggled in *Martin* and the Sixth Circuit struggled in *Poe*. *See Martin*, 812 F.2d at 1432-1435, and *Poe*, 853 F.2d at 431. As *Halperin*, *Martin*, and *Poe* show, the problem is not confined to cases involving prison policy; it can arise in a whole variety of contexts. And the case at bar provides the opportunity for this Court to deal with it.[2]

For the reasons given above and in our petition for certiorari, the petition should be granted.

DATED this 10th day of April, 1989.

Respectfully submitted,

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[2] The Ninth Circuit in the case at bar may well have thought it could finesse the problem, by focusing upon the policy rather than upon the conduct or motive of the individual defendants. The result will be to force every policy-oriented case to trial, since qualified immunity will be easily defeated.